EXHIBIT 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FRONTPOINT ASIAN EVENT DRIVEN
FUND, LTD., et al.,

Plaintiffs,

v. 16-cv-5263 (AKH)

CITIBANK, N.A., et al.,

Defendants.

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New York, N.Y.
April 27, 2017
2:50 p.m.

Before:

HON. ALVIN K. HELLERSTEIN

District Judge

APPEARANCES

LOWEY DANNENBERG COHEN & HART, P.C.
Attorneys for Plaintiffs
BY: CHRISTIAN LEVIS, ESQ.
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CAHILL GORDON & REINDEL LLP
Attorneys for the Credit Suisse Defendants
BY: JOEL L. KURTZBERG, ESQ.

(In open court; case called)

THE COURT: All right. This is Frontpoint Asian Event Driven Fund LP and Sonterra Capital Master Fund, Ltd. v. Citibank and many others, 16 Civil 5263.

These are motions by defendants on various grounds based on the alleged inadequacy of the first amended class action complaint.

Defendants will tell me how they plan to divide up the motions.

MR. PORPORA: Good afternoon, your Honor. Matthew Porpora of Sullivan & Cromwell for the Barclays defendants and speaking on behalf of the defendants today.

Your Honor, we've consulted with the plaintiff's counsel and we've agreed that, if it's acceptable to your Honor, we'll begin with arguing the defendants' motions to dismiss on 12(b)(1) and (12)(b)(6) grounds. Just for simplicity's sake I'll call that the merits motion. Defendants would argue first. That will be divided. Myself, I'll be handling Article III and antitrust claims. Mr. Gluck, to my right, will be handling the RICO claims. Mr. Synnott, to his right, will be handling the state law claims. That's the implied covenant claims and the unjust enrichment. And then after we make that affirmative presentation, your Honor, we propose that the plaintiffs respond. We would ask for a very short period of time to provide any rebuttal arguments we need.

THE COURT: What is Mr. Kurtzberg going to do?

MR. PORPORA: I'm going to get to that in just a moment, your Honor. The proposal would be that we handle the merits motion first, and then once we're done with that we then move over to the motion for lack of personal jurisdiction.

THE COURT: I think I would like to do the personal jurisdiction first.

MR. PORPORA: That would be fine with us, your Honor.

THE COURT: And rather than set arguments, I like to go back and forth. Is Mr. Kurtzberg going to do that?

MR. KURTZBERG: Yes, your Honor.

THE COURT: And who for the plaintiffs will argue jurisdiction?

MR. ST. PHILLIP: Your Honor, good afternoon. Peter St. Phillip from Lowey Dannenberg.

THE COURT: And do you start with personal and go into subject matter jurisdiction?

Let me do the jurisdictional arguments first.

MR. ST. PHILLIP: That's fine.

THE COURT: Whoever wants to argue them.

All right, Mr. Kurtzberg. You start.

MR. KURTZBERG: Thank you, your Honor.

Joel Kurtzberg from Cahill Gordon & Reindel on behalf of the Credit Suisse defendants and speaking on behalf of the foreign defendants who have moved on dismissal for lack of

personal jurisdiction and venue in this case.

In my argument I want to focus on three main points for you today. The first is that the foreign defendants did not consent to personal jurisdiction, as in general jurisdiction, in the State of New York by registering to do business under the New York Banking Law.

The second main point is that the plaintiffs cannot make out a prima facie case of specific jurisdiction under the purposeful availment or effects doctrine, for three reasons. They fail to show a substantial connection between the adequately pled stipulated conduct and either New York or the United States, the relevant forum, and that's an open question as well. Second reason, they fail to adequately allege that New York or the United States was the focal point or the nucleus of the alleged wrongdoing. And, third, the alleged link to the United States is not at a minimum a but-for or a proximate cause of the alleged wrongdoing.

And then my third point, main point, is that this notion of what we call vicarious conspiracy jurisdiction cannot save the day for the plaintiffs at the end of the day.

So with that overview, let me delve into the first point, which pertains to the fact that the defendants did not consent to general jurisdiction by registering branches or agencies under New York Banking Law, Section 200.

THE COURT: Mr. St. Phillip, I'm going to ask you to

respond to each of these arguments in turn. So you are not going to wait for the completion of all the arguments. Each subject will deal with its own set of arguments and responses.

MR. ST. PHILLIP: That's fine, your Honor.

MR. KURTZBERG: My first point, your Honor, is that the foreign defendants did not consent to general jurisdiction through New York Banking Law § 200-b, which merely provides that a New York resident may maintain an action against a foreign banking corporation. It does not confer general personal jurisdiction over the foreign defendants.

Plaintiff's position here is that by registering to do business under New York Banking 200-b, that the banks have consented to be sued for any cause of action whatsoever, whether it has any connection to New York or not.

THE COURT: Let me take it away from you and put it to Mr. St. Phillip. The relevant clause has this condition: a cause of action arising out of a transaction with its New York agency, or agencies, or branch or branches. That's key. And therefore anything that comes within that consent must satisfy that condition.

MR. ST. PHILLIP: Your Honor, where I'm looking in the statute is 200-b(2)(e), which in (2) says, "An action against a foreign banking corporation may be maintained by another foreign corporation in the following cases." And it enumerates certain circumstances. The last one says "where the defendant

is a foreign banking corporation doing business in the state."

That articulates a general jurisdiction discussion, as your Honor identified in the *Vera* case.

THE COURT: Is that a consent?

MR. ST. PHILLIP: That is the consequences of 200(3).

THE COURT: Why didn't *Daimler-Benz* take away that section?

MR. ST. PHILLIP: Your Honor, I went through *Daimler* in connection with the *Vera* decision.

THE COURT: Well, *Vera* is a special case. *Vera* is a situation where we're involved with various kinds of restrictions by the Treasury to deal with terrorist states. *Vera* in particular was the government of Cuba. And the proposed jurisdiction in that case was someone who was looking for assets that were lurking somewhere in the bank, an agency which had registered in New York State. I don't think you can assimilate this case to *Vera*.

MR. ST. PHILLIP: I would then go back to what the Second Circuit said in *Brown* in connection with the registration in New York. And it said that the New York courts have clearly for some time now -- it's beyond dispute -- have said that when you register to do business under the General Business Law, that you consent to jurisdiction here. And that provision goes back to 1916, Justice Cardozo's *Bagdon* decision from the New York Court of Appeals, which your Honor cited in

Vera.

There is no distinction in connection with what the consents -- the breadth of the consent in connection with whether it's a defendant or whether it's a third party as your Honor identified in the *Vera* case. The New York banking laws operate -- and this is from the *Vera* decision -- insofar as the local branches in New York can both sue and be sued.

THE COURT: Wouldn't you say that Section 200 is the consent provision and Section 200-b is the effects provision, the consequence of registration in the state?

MR. ST. PHILLIP: Yes. § 200-b identifies what will occur as a result of registration. § 200(3) says --

THE COURT: Wouldn't you say, then, that *Daimler-Benz* trumps New York law? 200-b is not a consent provision. It's a consequence provision. It's a consequence so that the foreign banking corporation --

MR. ST. PHILLIP: Well, it says an action may be maintained against the foreign bank if the foreign bank is doing business in the state. So it directs the foreign banks to register. And the due process issue is what the notice to the foreign banks are by the statute. It says that if you register in New York, you're subject to suit if you do business in the state. And that's 200-b(2)(e).

THE COURT: Mr. Kurtzberg.

MR. KURTZBERG: Your Honor, actually 200-b has been

held to be a subject matter jurisdiction clause, not a personal jurisdiction clause. That's in the *eFX* case that was cited in March of 2016 and in the New York Court of Appeals case *Indosuez International Financial v. National Reserve Bank*. It does not set forth consent, as would be required in *Brown*. And it certainly does not set forth consent explicitly to general jurisdiction over any cause of action. And if it did, it would be trumped by *Daimler*, as your question previously accepted.

THE COURT: It would seem to me, I think this is really consistent with your argument that consent is broader than the effects of doing business. The broadest kind of jurisdiction flows on consent. And in 200.3, consent is conditioned to specific jurisdiction.

MR. KURTZBERG: I would agree with that, your Honor, absolutely.

THE COURT: And so you can't have a statute dealing with the consequences of doing business that is broader than consent. I think there has to be a way of limiting jurisdiction under 200-b so it doesn't become more embracing than a consent statute.

Furthermore, I think *Daimler-Benz* applies as well, and limits the areas that can be sued to situations where *Daimler-Benz* is satisfied.

But why do you say this is a subject matter clause? I can't understand that, because this has to do with when

lawsuits can be made, can be served.

MR. KURTZBERG: That's correct. Again, perhaps it's just nomenclature. I think we may be saying the same thing, your Honor. But in the *Indosuez* decision that I cited to, § 200-b was cited by the Court of Appeals when talking about what cases could be brought, and that's what I mean by subject matter jurisdiction. When they discuss personal jurisdiction, they didn't say -- I'm sorry.

THE COURT: New York Court of Appeals?

MR. KURTZBERG: Yes, sir. And in the *FX* decisions from the Southern District in March of 2016, the court made clear also that this was a -- called it a subject matter jurisdiction, not a personal jurisdiction situation. And to read it otherwise would take it too far, for the reasons your Honor just stated. It would violate *Daimler*'s rule because it would allow for general jurisdiction over any banking corporation doing business in the state for any cause of action even if it had nothing to do with New York or its presence in the state. And it certainly doesn't provide the kind of explicit consent required under *Brown*.

THE COURT: I think the ambiguity in terminology is because subject matter jurisdiction is different under New York law, as compared to under federal law. But 200-b is a statute that regulates when lawsuits can be brought. And it's not a regulation of the subject matter of the lawsuit, as I read it.

I'll explore the situation further, but my present inclination is to hold that jurisdiction has to be limited to the specific jurisdiction aspect of federal law, and it doesn't apply here.

MR. ST. PHILLIP: Your Honor, may I be heard just briefly on that?

THE COURT: Yes.

MR. ST. PHILLIP: In the *Brown v. Lockheed Martin* case from the Second Circuit, the Connecticut registration statute was at issue, and the holding of the court is limited to the determination that the Connecticut statute's text did not put the defendants there on notice, Lockheed Martin, that by registering it would be subject to general jurisdiction. The Second Circuit, however, made a distinction between Connecticut and New York's statute by saying that jurisdictions other than Connecticut have enacted registration statutes that more plainly advise the registrant that enrolling in the state as a foreign corporation and transacting business will vest the local courts with general jurisdiction over the corporation. And the next sentence says that the registration statute in the State of New York has been definitively construed to accomplish that end, and legislation has been introduced to ratify that construction of the statute. And this is 814 F.3d 619. So the Second Circuit recognized that the New York registration, as opposed to the Connecticut registration statute, did grant

general jurisdiction. And they made a specific discussion of the New York State.

THE COURT: I'll consider the matter further, Mr. St. Phillip, but I've expressed --

MR. KURTZBERG: May I respond to that, your Honor, or would you like to move on?

THE COURT: I think it's pretty well clear. Yes. Go ahead, Mr. Kurtzberg.

MR. KURTZBERG: I just want to say that the dicta that he's pointing to that really is dicta in *Brown* is first of all making reference to a different statute than the one we're talking about here. It's New York Business Corporation Law, I believe it's Section 1314, has nothing to do with what's actually been alleged here, and that dicta also, I think, could be called into question because the law review article that's even cited for that proposition in *Brown* actually leads to a different interpretation and suggests that there was a bill proposed to put that into law as a statute, and that there wouldn't really be a need to propose a bill if it were already the case that it were the law. So I don't think that dicta is anything more than dicta, and it's not applicable here, and shouldn't be followed even if it were.

THE COURT: Thank you, Mr. Kurtzberg.

MR. KURTZBERG: Unless your Honor has questions about consent, I'm going to move on to my second main point, which is

essentially that plaintiffs failed to make out a prima facie showing of specific jurisdiction on the facts that they have alleged here.

In order to show specific -- they concede that there is no general jurisdiction. They are not arguing general jurisdiction. But for specific jurisdiction -- and this is straight out of the *Walden* decision by the U.S. Supreme Court -- the defendant's suit-related conduct must create a substantial connection with the forum state.

THE COURT: Why don't we start with the allegations that are in question, and examine the allegations of the first amended complaint.

MR. KURTZBERG: Sure. The allegations of the complaint basically focus on allegations that there was manipulation of three benchmark rates, U.S. dollar SIBOR, Singapore dollar SIBOR.

THE COURT: But surely there must be some allegation having to do with New York, or at least United States.

MR. KURTZBERG: Well, I'll get there. And the last one is SOR. The only connection to New York --

THE COURT: The last one is what?

MR. KURTZBERG: Sorry?

THE COURT: SOR?

MR. KURTZBERG: SOR, S-O-R, all caps.

The connection that they claim to New York,

predominantly, quite frankly -- and this is a huge part of the problem for their case -- has to do with transactions that have nothing to do with their own claim.

THE COURT: What is the allegation?

MR. KURTZBERG: The allegation is that SOR and SIBOR were manipulated --

THE COURT: On the Singapore market.

MR. KURTZBERG: -- outside of the United States, and that that manipulation led to trades that brought in derivatives that were based on those benchmarks.

THE COURT: There's a link between them. So we're dealing with the Singapore interbank rate --

MR. KURTZBERG: Correct.

THE COURT: -- on the Singapore monetary models, which then becomes communicated to Thomson Reuters. Is Thomson Reuters a company that's uniquely located in the United States?

MR. KURTZBERG: No, your Honor.

THE COURT: What does the complaint say? What paragraph of the complaint?

MR. KURTZBERG: As to Thomson Reuters?

THE COURT: As to anything. Maybe Mr. St. Phillip is the better one to answer the question.

What allegation, what paragraph, am I looking at?

MR. ST. PHILLIP: Your Honor, since Mr. Levis is going to go first, he has prepared for this question.

THE COURT: Mr. Levis.

MR. LEVIS: I'm sorry. We'll switch off.

Yes. Thomson Reuters, to answer your question, is a U.S. corporation that receives the transmission that you were discussing on SIBOR-SOR rates.

THE COURT: What allegation shall I look at? What paragraph?

MR. LEVIS: Well, I have to find the paragraph that talks about Thomson Reuters. But while I'm looking for it --

THE COURT: No, no. I'll wait.

MR. LEVIS: The process is described in paragraph 102 of the daily SIBOR rates that are published and distributed throughout the United States by Thomson Reuters via U.S. wires, where they are used to price, benchmark, and settle billions of dollars of SIBOR derivatives trading in the United States.

THE COURT: 102?

MR. LEVIS: 102.

And then 103 discusses SOR.

THE COURT: One moment.

(Pause)

what is ABS?

MR. LEVIS: The Association of Banks in Singapore, which is the defendants' trade group which organizes the rate and manages them and controls the rate-setting process.

THE COURT: Is Thomson Reuters a defendant?

MR. LEVIS: No.

MR. KURTZBERG: That's the problem, your Honor.

THE COURT: One moment, Mr. Kurtzberg.

MR. KURTZBERG: Sure.

THE COURT: So why is an act of Thomson Reuters attributable to defendants?

MR. LEVIS: It's not the act of the rate being disseminated itself that's the issue. What defendants are doing to try and move their conspiracy overseas is to split it into separate parts, whereas the rate-setting process is separate from the actual derivatives dealing that they do in the United States to generate --

THE COURT: The derivatives are the consequence.

MR. LEVIS: The derivatives are the products through which they make money off the conspiracy. And if we look at *United States v. Apple* in the Second Circuit, defendants cannot separate the conspiracy into component parts and analyze it into pieces. That rationale goes back to the 1940s from the Supreme Court's case in *Tomkin and Duvor* --

THE COURT: You may be correct, but my function here is to look at the allegations of the complaint.

MR. LEVIS: Yes.

THE COURT: And maybe you can amend to fix it up. But 102 does not give you jurisdiction.

MR. LEVIS: It's not 102 by itself. What happens is,

as the rate is set, it is incorporated into the price of the contracts that our plaintiffs and other class members traded. And those contracts, such as SIBOR-based swaps, that the Frontpoint plaintiff purchased and the FX swaps and forwards that Sonterra purchased incorporates --

THE COURT: You will have to prove, consistent with that theory, that it was the purpose of each and all the defendants to manipulate the rates in order to gain some kind of monetary advantage to a derivatives contract made with your clients that caused injury to business or property of your clients. That needs to be alleged. It doesn't need to be divined by the judge. It needs to be alleged. And I don't see an allegation that does that.

MR. LEVIS: Our allegation is that we were overcharged as a result of the rates being set, because when we entered these contracts and the contracts, the swap contracts and forward contracts that we purchased, which incorporate the rate that defendants manipulated, we paid an artificial price that was higher than what it should have been.

THE COURT: Maybe. And maybe you didn't. But conspiracy does not depend on consequence. It depends on intent. One must have a shared intent with a co-conspirator. Where do you allege the shared intent in a way that causes specific jurisdiction?

MR. LEVIS: Well, the shared intent comes from the

government settlements, which describe the conspiracy.

THE COURT: Settlements where?

MR. LEVIS: What paragraph number?

THE COURT: Exactly. I have a technical job here.

MR. LEVIS: I understand.

THE COURT: And that is to find the allegation in the complaint that satisfies specific jurisdiction.

MR. LEVIS: We start talking about the government settlements in paragraph 121. And that's on page 44. And there we begin discussing what the Monetary Authority of Singapore, who is the regulator that conducted the investigation, found, and that was a conspiracy involving in 133 traders from 20 different banks to manipulate SIBOR and SOR along with other benchmark interest rates that were used in the foreign exchange market. Those traders were manipulating for profit.

THE COURT: What relevance to me is a finding of a Singapore authority? Does that qualify under Fed.R.Evid. 803(8)

MR. LEVIS: Whether or not it qualifies at this point as admissible evidence, what we're dealing with is just whether or not there's a plausible conspiracy or if we've alleged a prima facie conspiracy for the purpose of jurisdiction.

THE COURT: I don't see a jurisdiction allegation in 121 or the paragraphs following.

MR. LEVIS: We're going through the government findings to show that the goal of the conspiracy was to manipulate for profit. And that's because the profit motive is important to analyze the relevance of defendants' conduct and contacts with the forum for jurisdictional purposes. When we look at analyzing jurisdiction in a conspiracy case, Judge Buchwald in *LIBOR VI*, looking back to the *Socony Vacuum Oil* case, said that the first step is to evaluate the goal of a conspiracy. And if the goal of the conspiracy here was to increase profits are their derivatives transactions, then the conspiracy's goal is absolutely important. And if regulators find --

THE COURT: The conspirators in Singapore had in mind that they would create derivative contracts other places in the world, including New York.

MR. LEVIS: Well, they knew it, because the benchmark that they created and they set through the association of banks in Singapore is a benchmark that's used worldwide. The defendants, in their U.S. offices, sell and market these products in the U.S. They knew that those products were incorporated, incorporated a benchmark that they were manipulating, and then they marked --

THE COURT: That doesn't prove conspiracy.

MR. LEVIS: Well, the conspiracy to manipulate the rate and to profit from the sale of derivatives is a unified

conspiracy that exists in Singapore, through the rate-setting process, but also in the United States, through the derivative sales that were in furtherance of that same conspiracy.

THE COURT: You're alleging that intentions formed and executed in Singapore had consequences in every financial market around the world, including New York. I don't see that as satisfying the rule of specific jurisdiction.

MR. LEVIS: Well, those intentions, regardless where they were created or hatched, or regardless of whether the defendants agreed to --

THE COURT: "Regardless" won't do it. Location is crucial.

MR. ST. PHILLIP: Your Honor, may I be heard?

THE COURT: No, Mr. Levis has got this one.

MR. LEVIS: Well, for specific jurisdiction, I understand your position that the intention was formed in --

THE COURT: Unfortunately I'm the judge.

MR. LEVIS: I understand. But there is no requirement that anything be exclusively directed or exclusively aimed at the United States. The fact that this is a worldwide utilized benchmark does not make specific jurisdiction impossible in the United States.

THE COURT: Before *Morrison*, in the Supreme Court, the law was under the *Leasco v. Maxwell*, a decision by Judge Friendly, who would accord jurisdiction and subject matter

jurisdiction to wrongful acts committed abroad which had substantial effects within the United States. You don't even satisfy the *Leasco v. Maxwell* tests, by the kinds of allegations you have. It may be that you could amend to show jurisdiction.

Jurisdiction should not depend on the most sophisticated judges. It should depend on ordinary guys like me to be able to say, oh, here's the jurisdiction. I don't see it, Mr. Levis. If you want to amend, I'll let you amend, but I don't see it in this complaint.

MR. LEVIS: I understand. I only think that that's because you're viewing the conspiracy in Singapore separate from the acts in the United States, which are acts in furtherance of the same conspiracy. Those sales are the violations that gave rise to plaintiffs' antitrust claims.

THE COURT: You're saying that the overt act is in the United States.

MR. LEVIS: Correct.

THE COURT: You don't even allege that. It has to be plausibly connected with intentions formed in Singapore. You have to allege, to make out a specific jurisdiction claim, that the conspirators in Singapore intended to profit by their conspiracy and manipulation in derivative contracts made in New York. You've got to allege that. And you've got to prove it.

MR. LEVIS: Well, proving it --

THE COURT: I don't see this complaint as doing anything but making a huge amorphous mess, out of which a judge or jury has to make a divination. Divinations do not satisfy the law.

MR. LEVIS: Well, the profit motive was not specific to the United States. They were profiting everywhere. And the profit extended into the United States.

THE COURT: Maybe that's your problem.

MR. LEVIS: There is no requirement that it's exclusively in the United States.

THE COURT: Maybe that's your problem. Maybe your lawsuit should be brought in Singapore. But unless you improve it with some very good allegations, you're not going to be able to do it in New York.

MR. ST. PHILLIP: May I be heard? Shortly?

THE COURT: It's my rule that one person do an argument, but I'll bend the rule for you, because you have such a smiling face.

MR. ST. PHILLIP: Perhaps not at the end of this argument.

THE COURT: And since you compete with me as to lack of hair.

MR. ST. PHILLIP: We're on the same level, that's for sure.

But, your Honor, the matter in which this conspiracy

worked was that the defendants, the foreign banks that are at issue, set up shop in the United States. They registered to do business. But that's separate from the consent argument.

THE COURT: They have sister affiliates of the same company.

MR. ST. PHILLIP: No, it's the same company. They're actually a branch, a New York branch. They're not an affiliate entity.

So they come to the United States. They have trading floors. They have salespeople. They go out to our clients, these hedge funds and public pension funds, and they offer to do this business, which is the interest rate swaps business. The contracts that they enter into, Deutsche Bank, for example, consents that -- we have that argument as well, and it is to this Court, of any --

THE COURT: I might feel differently if this were not a class action and it was an action by your client saying they overpaid, or unpaid, as it goes, with derivatives contracts, that lost money, they were injured in their business or property, in a specific contract, because of acts done abroad.

MR. ST. PHILLIP: That's what we allege, your Honor.

THE COURT: I can see that. But as a class action, there are all kinds of different people in different situations, and different contracts. You do not have a good complaint.

MR. ST. PHILLIP: Let me suggest that you look at this complaint as if it is not a class action, which under Rule 12 I think we do. Paragraph 20, we say, plaintiff Frontpoint entered into 24 swap transactions.

THE COURT: What paragraph?

MR. ST. PHILLIP: Paragraph 20.

Plaintiff Frontpoint is in Greenwich, Connecticut. They enter into 24 swap transactions, including based on one-month SIBOR, directly with Deutsche Bank AG, which is one of the foreign banks that's moving to dismiss from within the United States during the class period, at artificial prices proximately caused by the manipulation, as we describe in here, and the government regulator. That's just not the foreign governments that have found this happen.

The contracts themselves have SIBOR as part of the price, to determine who's going to pay whom under the swap. So they are here. Deutsche Bank is here. They are contracting directly with the Greenwich plaintiff. They are manipulating the price of that contract.

THE COURT: These are so general as not to satisfy the rule of plausibility. As I said before -- and I think we're going to finish on this point now, Mr. St. Phillip -- you can amend. But your amendment has to focus on a jurisdictional qualification that satisfies the most recent Supreme Court decisions.

So that will be the ruling, that there is not sufficiently alleged in this first amended class action complaint the necessary requirements for specific jurisdiction.

What's next, Mr. Kurtzberg? Finished?

MR. KURTZBERG: I'm finished if that's your ruling, your Honor, yes.

THE COURT: That's my ruling.

So as to general jurisdiction I reserve, and as to specific jurisdiction I've found.

MR. KURTZBERG: Thank you, your Honor.

THE COURT: Who's next? Mr. Porpora.

MR. PORPORA: Thank you, your Honor.

If I understood you correctly before, you want to move on to subject matter jurisdiction at this point?

THE COURT: Yes.

MR. PORPORA: Your Honor, I'm going to explain why the plaintiffs failed to allege subject matter jurisdiction, because they failed to allege Article III injury or damages. Now, your Honor, you've already talked about a little bit with Mr. Kurtzberg the different benchmark interest rate at issue in this case, but think it's worth again just emphasizing that this case is about three benchmark interest rates and only those benchmark interest rates. That's USD, SIBOR, SGD SIBOR, and SOR.

THE COURT: Design the terms.

MR. PORPORA: Sure. USD SIBOR, your Honor, is the Singapore interbank offer rate for U.S. dollars.

THE COURT: Traded in Singapore.

MR. PORPORA: Yes. It is the rate for borrowing U.S. dollars in the Singapore market. Then you have SGD SIBOR, which is essentially the same type of rate but for Singapore dollars in the Singapore market. And then you have SOR, which is the Singapore swap offer rate for Singapore dollars. And SOR is a touch more complicated, but represents the cost of borrowing Singapore dollars by exchanging U.S. dollars in the foreign exchange market.

The next fundamental factor I just want to point out before I get into the presentation is that the plaintiffs here are alleging that all 46 defendants named in this complaint engaged in a widespread conspiracy for four years, from 2007 to 2011, to manipulate these three rates. They alleged their injury when they were trading certain financial products, at unspecified times -- and they don't specify the positions they took -- because they assert they paid more for or received less than they should have, because of defendants' alleged manipulation.

There are a variety of problems with that. I'll get to that in a moment. But the fundamental point that I wanted to point out to your Honor is, again, this case is only about SIBOR or SOR. And yet the plaintiffs' complaint and their

papers in the opposition to the motion to dismiss routinely point to alleged conduct with respect to other benchmark interest rates. This isn't a case about foreign exchange rates. It isn't a case about nondeliverable forwards. This isn't a case about foreign exchange rates. It's not a case about not knowing verbal forwards. It's not about ISDA FX. It's not about the dollar LIBOR or Euribor. It's a case about SIBOR or SOR. And for these plaintiffs to establish that either of those benchmarks were actually manipulated, they have to point to language with respect to those rates, of course.

As the Second Circuit described almost a decade ago in *In Re Elevator*, a plaintiff can't meet its pleading burden simply by saying, if it happened there it's likely to happen here. And Judge Buchwald actually echoed that same exact sentiment in the *LIBOR IV* decision when she said you can't ascribe bad conduct with respect to one benchmark rate that relates to different people, different conduct and different countries, even to a different benchmark interest rate. That's what the plaintiffs seek to do here.

THE COURT: It has nothing to do with jurisdiction, does it?

MR. PORPORA: Well, it has to do with jurisdiction because, though plaintiffs haven't established that they were harmed in any way, they haven't established that there is a case or controversy for this court to hear.

THE COURT: They say that they overpaid in the derivatives contracts. Wouldn't that be an interest to business or profit?

MR. PORPORA: Yes, your Honor. If that was a well-pled allegation it would. It's not a well-pled allegation, however, because the way they get to the allegation of manipulation is through misstating documents. Let me walk you through what they do. I think you heard from the plaintiffs before where they pointed to some paragraphs in the complaint and said, well, your Honor, regulators found that this stuff had been manipulated, regulators found that there was a conspiracy to manipulate, so that gets the job done for us, and then we say that manipulation hurts. The problem is, they don't point to anything that plausibly alleges that SIBOR or SOR was ever manipulated during the class period, your Honor.

First, they point to a press release from the Monetary Authority of Singapore, MAS, as it's known, concerning MAS's investigation into a number of benchmark interest rates, including SIBOR or SOR. They then point to certain regulatory settlements between three of the 46 defendants here that dealt with conduct on other benchmark interest rates.

Third, they deal with a handful of news reports, and they say there is information in these various materials that show that there was a conspiracy to manipulate SIBOR or SOR.

So our papers, your Honor, particularly our reply brief, lists all of these out. I won't plod through all of them, but I do want to focus on two examples. First, the MAS press release.

THE COURT: I don't think it has anything to do with jurisdiction.

MR. PORPORA: Your Honor, in order for them to establish that this Court has jurisdiction to hear this matter, they have to show that there is some injury, there is some controversy to adjudicate.

THE COURT: They allege that the three rates were manipulated, that the effects of the manipulation was to increase the price of derivatives contracts, and that they were injured in their business or property. Now, I grant you that it took them a lot longer, with a lot more ambiguity, to get to that point, but that's how I understand the case. So if that's the case, it has nothing to do with jurisdiction. You want to tell me about jurisdiction, you want to tell me about *Morrison*, you want to tell me about conspiracies, things like that?

MR. PORPORA: Your Honor, I want to speak explicitly about the conspiracy alleged here, because there is no factual basis for the allegation that there was such a conspiracy. For instance, your Honor, just by way of example --

THE COURT: What do they have to allege to allege a conspiracy?

MR. PORPORA: Any facts whatsoever to create a plausible inference that the conspiracy occurred.

THE COURT: They don't do that?

MR. PORPORA: They don't do that, your Honor.

THE COURT: Mr. St. Phillip, do you do that? Mr. Levis, do you do that?

MR. ST. PHILLIP: Mr. Levis.

MR. LEVIS: Yes, we do.

THE COURT: I always call the wrong person.

MR. LEVIS: That's OK. I wish it were easier to tell us apart.

Yes. I agree with your Honor that this is not a question of jurisdiction. What defendants are effectively arguing is, they're trying to deny --

THE COURT: Give me the paragraph.

MR. LEVIS: OK. I will point you to the paragraph. It's a denial of the conspiracy allegations in the complaint.

THE COURT: Where is the paragraph?

MR. LEVIS: I'm looking for the paragraph.

THE COURT: I have a brilliant law clerk. I have all these cases. I have all these arguments. I want to have the paragraphs. It's a very difficult complaint to read.

MR. LEVIS: I'm starting again on paragraph 121, where we describe the regulatory findings. And if you look -- this goes both to the regulatory findings and defendants' contention

that there is no finding of conspiracy, and an article that we cite in paragraph 124 of the complaint.

THE COURT: Is a conspiracy formed abroad which has an effect and not even a unique effect in the United States cognizable under *Morrison*?

MR. LEVIS: Well, under *Morrison*, if the Court was dealing with trading specifically on a foreign exchange in a situation where --

THE COURT: And that's this?

MR. LEVIS: Well, this is not an exchange. So the rate itself -- and this is just to reference something Mr. Porpora said -- the rate is not traded in Singapore.

THE COURT: The world doesn't function in exchanges anymore. It functions in different offices and massive computers that in effect replace the -- they make a virtual exchange out of what used to be a building or a location or a floor. The same thing as an exchange.

MR. LEVIS: The difference, to talk about *Morrison*, the difference is, in *Morrison*, you had foreign plaintiffs trading securities in a foreign exchange, trying to bring claims for foreign conduct in the United States. Here, plaintiffs are in the United States. They traded products price based on a rate in the United States, and we are suing for harm in the United States.

THE COURT: The conspirators were all abroad. The

conspirators were in the offices in Singapore calling one another and saying, hey, let's fix the rate.

MR. LEVIS: Well, the conspirators were not solely located in Singapore. This goes back the previous discussion of the scope of the conspiracy. When we look at what's in the actual settlements themselves, the conspiracy was in Singapore, but also in the United States and in London and Tokyo, and it operated across the world.

THE COURT: Show me one allegation showing a conspirator in New York.

MR. LEVIS: OK. Hold on. I will read from one of the settlements that are cited in the complaint.

THE COURT: Read a paragraph.

MR. LEVIS: I'm going to give you the paragraph in one second. It cites to the Deutsche Bank CFTC settlement.

THE COURT: Your answer should be "Paragraph so-and-so, your Honor."

MR. LEVIS: Paragraph 126.

THE COURT: 126.

MR. LEVIS: Paragraph 126, where we describe Deutsche Bank, cites to a page in Deutsche Bank's CFTC settlement and alleges systematic pervasive misconduct directed at manipulating SIBOR and SOR along with several other benchmark interest rates.

When you read the section of the settlement that we

are citing to --

THE COURT: Excuse me. Does this have to do with findings of the Commodities Future Trading Commission?

MR. LEVIS: That's correct.

THE COURT: Having to do with a manipulation found somewhere in the world?

MR. LEVIS: That is correct.

THE COURT: You don't say where.

MR. LEVIS: When you look at the settlement, and part of the settlement that we are citing, this is what I'm going to read that is cited in the complaint. That's where the allegation comes from. It cites the settlement on page 3.

THE COURT: Page 3 of what?

MR. LEVIS: Of the CFTC settlement.

THE COURT: It's incorporated in the complaint?

MR. LEVIS: Yes, it is.

It says, "Over a more-than-six-year period" --

THE COURT: Where are you reading from?

MR. LEVIS: Page 3, Deutsche Bank CFTC settlement.

THE COURT: Where does the paragraph begin?

MR. LEVIS: I don't know what paragraph -- it's on the bottom of page 2 and continues to the top of page 3. I think the top of page 3 is the reference to New York. It starts, "Over more than a six-year period and across currencies, Deutsche Bank submitters routinely took into account other

Deutsche Bank traders' derivatives positions, as well as their own cash and derivatives trading positions, when making the bank's LIBOR and Euribor submissions. On other occasions, Deutsche Bank aided and abetted other panel banks' attempts to manipulate Euribor and LIBOR.

THE COURT: Euribor is?

MR. LEVIS: It's a different benchmark.

THE COURT: It's what? The Frankfurt exchange?

MR. LEVIS: It's set in the European Union. I don't know if it's in Frankfurt.

THE COURT: So it's Frankfurt. And the yen is Tokyo.

MR. LEVIS: Yes.

THE COURT: And what does this have to do with Singapore?

MR. LEVIS: I'm getting to the next sentence. "The conduct of Deutsche Bank's submitters, traders, debts managers, and at least one senior manager was systemic and pervasive, occurring across multiple trading desks and offices, including London, Frankfurt, New York, Tokyo, and Singapore."

At the end of that sentence is a footnote. And the footnote says, "Deutsche Bank's misconduct extended beyond the LIBOR and Euribor benchmarks. Through its internal investigations, Deutsche Bank identified evidence of similar misconduct with respect to attempts to influence and at times attempts to manipulate other interest rate benchmarks,

including but not limited to Singapore interbank offered rates -- that's SIBOR -- Singapore swap offer rate -- that's SOR -- and the Tom-Next Indexed Swaps for Swiss franc.

So this is similar misconduct. This is where the settlement is referring to Deutsche Bank's manipulation of SIBOR and SOR, and it is saying that this occurs through systemic and persuasive conduct, involving offices in London, Frankfurt, New York, Tokyo, and Singapore.

So the conspiracy is not only not limited to Singapore. It's operated in the United States out of New York.

THE COURT: I can envision how you could properly fix up your complaint to allege this. But you haven't done it yet. So maybe in the next try, you'll be able to do it.

Again, I do not want to divine this. I want it simply and clearly alleged in ways that will satisfy specific jurisdiction and satisfy *Morrison*.

MR. LEVIS: OK.

THE COURT: OK. So that's the ruling on jurisdiction.

OK, Mr. Porpora, what's next?

MR. PORPORA: Your Honor, I'll move to --

THE COURT: To summarize on jurisdiction -- we'll finish the jurisdiction, right?

MR. PORPORA: Your Honor, the defendants continue to contend that the plaintiffs haven't stopped short of a 403 injury, but your Honor has made a ruling on that front, so

we'll move on to --

THE COURT: The Article III has to do with standing.

MR. PORPORA: Yes, your Honor.

THE COURT: I have not reached that yet.

MR. PORPORA: OK. I'm happy to take it up.

THE COURT: But on the issue of general jurisdiction and specific jurisdiction and subject matter jurisdiction, my ruling is to reserve on general jurisdiction, to grant the motion with leave to amend on specific jurisdiction and subject matter jurisdiction, and we'll fix the times for amendment later on. Probably I'll do that when I deliver the rule on general jurisdiction.

MR. KURTZBERG: Your Honor, if I may ask a question to clarify what you just said, you said you're reserving on general jurisdiction. The plaintiffs have said that they are not moving on general jurisdiction grounds at all. So I'm not clear on what you mean by that.

THE COURT: Plaintiffs are not basing the case on general --

MR. KURTZBERG: They have expressly disavowed any argument under general jurisdiction.

MR. ST. PHILLIP: That's nomenclature that we're talking about. The argument that I made to you in connection with 200 of the New York Banking Law is not -- it's consent to general jurisdiction.

THE COURT: That's what I meant by "general jurisdiction." That needs to be called general jurisdiction, along with the appearances of doing business.

MR. KURTZBERG: I understand, your Honor. Thank you, your Honor.

THE COURT: I'm not sure it's clarified anything.

MR. KURTZBERG: Thank you.

THE COURT: OK?

MR. PORPORA: Thank you, your Honor.

So I think similar --

THE COURT: Case or controversy.

MR. PORPORA: I think a similar issue with respect to nomenclature. Let me phrase my argument in terms of standing. That's what I had intended to argue before. Apologies for confusion.

THE COURT: No problem.

MR. PORPORA: What I do want to point out to you, your Honor, is that the plaintiffs have failed to adequately establish that they have standing to bring a claim.

THE COURT: Well, they've lost money, they say, on the derivatives contracts. Isn't that enough?

MR. PORPORA: Your Honor, with your permission, could I hand you two exhibits that are in the record that have been filed?

THE COURT: Yes.

MR. PORPORA: Your Honor, those are two separate exhibits, the Porpora declaration, which was filed in support of defendant's motion to dismiss the matter. Those are also highlighted for your Honor's convenience. I'm going to reference the reasons why.

THE COURT: The picture looks like you.

MR. PORPORA: That's unfortunate for me.

OK. Your Honor skipped straight to the question of whether or not they had been injured on their profit. They allege they have been injured on their profit. But before we get there, I think again have to deal with the fact of whether they actually pled that these benchmarks have been manipulated. In order for them to be injured, there has to be some manipulation. But although they say in a conclusory way in their complaint that those benchmarks were manipulated, they point to no facts suggesting that, your Honor.

THE COURT: So the argument is that there is no plausible allegation of manipulation.

MR. PORPORA: That's absolutely correct. And in a moment I'll also talk about how, certainly, if there's no plausible allegation of manipulation, there is certainly no plausible allegation of manipulation by way of conspiracy.

So let's begin with manipulation. What I just handed up to you is a press release from us. This is what I referred to earlier. And, your Honor, if I could get your Honor to look

at paragraph 6 -- or, excuse me -- paragraph 7 of that MAS press release.

THE COURT: The one that you've highlighted.

MR. PORPORA: Yes. It is highlighted at paragraph 7, correct, on the first page.

THE COURT: These are merits arguments.

MR. PORPORA: I'm sorry, your Honor?

THE COURT: These are merits arguments. These are arguments that --

MR. PORPORA: They are really not, your Honor. The point is --

THE COURT: The point is, there is no merit to this allegation.

MR. PORPORA: Right. It's not only that there's no merit, your Honor. It's that there is a misstatement. The plaintiffs say in their complaint, on 20 separate occasions, that MAS concluded that the defendants have engaged in manipulation to manipulate these rates.

THE COURT: It's only to buttress their allegation that they say this.

MR. PORPORA: I'm sorry, your Honor?

THE COURT: It's to buttress their allegation.

MR. PORPORA: Yes. Well, it's the fact that their allegations lack any factual support whatsoever. There is literally nothing they point to that says, this is how we have

determined that there has been manipulation of these rates. What they say is, MAS conducted an investigation of a bunch of different conduct with respect to a whole bunch of different benchmark interest rates. And they came out with a press release. And in the press release they said that there were a bunch of problems with a bunch of different benchmark rates and as a rule they were going to require some sanction on a number of banks.

THE COURT: Haven't they alleged that there was an agreement among traders to have an artificially low or high rate?

MR. PORPORA: There is nothing, in any of the materials that they tell you say that, that does say that.

Why don't we move on to the second document that I handed to you, your Honor. That's Exhibit F. And also highlighted for your Honor --

THE COURT: I'd be happier if you talked about paragraphs in the complaint and either their sufficiency or insufficiency. This is a function of the complaint.

MR. PORPORA: It is, your Honor. That's absolutely correct, that it's a function of the complaint. What they do, and I think Mr. Levis pointed this to you before, the plaintiffs don't begin to make any allegations whatsoever about any misconduct until paragraph 120. Up until that point, the first 43 pages of the complaint, there's a little bit of an

introduction, but then they sort of plod through who each defendant is, where the defendant operates, etc. The first time you get to any substantive allegations of any misconduct is at page 44. And what the plaintiffs do is, they simply refer to a number of things. They refer to the three categories of materials I mentioned earlier: the MAS press release, certain regulatory findings by the CFTC and the FSA, and certain newspaper articles.

And so, your Honor -- and I apologize that I have to hand up newspaper articles -- but there is no way to test the sufficiency of the complaint on the face of the complaint, because there are no specific allegations in the complaint that point out what plaintiffs did. They say in conclusory terms things like, oh, all the defendants manipulated the rates, all of the defendants engaged in block trading. But those are conclusions, your Honor. Those are factual allegations. And they say the support for those conclusions come by way of these different materials. But when you look at the materials, they don't say what the plaintiffs tell you they say.

Your Honor, I see that you're reading. I don't want to interrupt you, but if I can take you to the article --

THE COURT: No, I have separate ears and eyes.

MR. PORPORA: That is a fair point.

THE COURT: We all experience this.

I'm looking at the paragraphs beginning at around 130

and going on through the beautiful chart on page 50 dealing with various spreads. It looks to me like they have alleged manipulation.

MR. PORPORA: Your Honor, I'm happy to take those in turn.

The paragraphs at 130, beginning at 130, relate to more newspaper articles. And the plaintiffs misrepresent in here that, for example, 131, "a Macquarie bank trader was fired for inappropriately collaborating with staff at other banks" -- that's the quote -- to rig the SIBOR, SOR, and foreign exchange rates. Do you know why that part isn't quoted, your Honor? The article doesn't say that. The article doesn't offer any plausible reason for someone to glean that when you read that newspaper article.

Same thing with the article that I handed up to you a moment ago. The article I handed you --

THE COURT: 133 talks about Commerzbank and a particular trader who was fired and a conversation that was found in his chat, a function on, I guess, the phone, where he discusses manipulation with traders from other banks.

MR. PORPORA: That's exactly right, your Honor. And that paragraph relates to, if you look at the very first sentence, "Commerzbank trader Eugene Wong Ming-Wey was fired in January 2013 for manipulating foreign exchange forward rates."

THE COURT: And 134 talks about the effects of

spreads.

MR. PORPORA: Yes. Your Honor, I'll get to the economic analysis in just one moment but --

THE COURT: Please, you may be right. It may be these allegations can't stand. But they're sufficient. They're really sufficient. It could be made a lot cleaner. It could be more succinct. It could be made more effectively. But it's there.

MR. PORPORA: Your Honor, just responding to the paragraphs, the foreign exchange forward rate is not SIBOR or SOR at all. This takes us back to the beginning of my presentation, your Honor. What the plaintiffs do is, they point to manipulation of other benchmark rates. And even if, your Honor, some of these rates are germane, there is nothing in here that suggests that there was actually a conspiracy to manipulate them.

THE COURT: 137.

MR. PORPORA: Right. So what the plaintiffs then go on to do is, they're offered a series of economic analysis, right. And what they basically do is, they say, here are depictions of spreads between two of the three relevant benchmark rates in the case, right. Again, there is U.S. dollar SIBOR. There's SGD SIBOR. And there's SOR.

THE COURT: They don't distinguish.

But then what they say is, there's indicia in terms of

spreads that indicate manipulation.

First of all, manipulation is very hard to show. It's very hard to show differences between competitive rates and manipulated rates. So we're dealing pretty much with inferences. And they allege that one of the ways you can tell is that spreads are official. So they make an analysis of spreads in the SOR and SIBOR. And that's figure 1 on page 50. I'm sure they've taken this out of one of the reports of the agencies. And they allege an inference of manipulation. It's good enough. It may not work. It may not be proveable. But it's good enough at this point.

MR. PORPORA: Your Honor --

THE COURT: Good try, Mr. Porpora, but this one doesn't work. The motion to that extent is denied.

MR. PORPORA: Very well, your Honor.

Perhaps I can move on, then --

THE COURT: And in terms of case or controversy, there is an adequate allegation that the plaintiffs were hurt by having to pay too much in their derivatives contracts based on a relationship between the derivative contracts and the manipulated rates of the Singapore market of SIBOR and SOR. So there is a case or controversy as alleged and there is standing that is alleged.

MR. PORPORA: Your Honor, if I could, just on that last point, just point out to the Court that Judge Buchwald in

the U.S. dollar LIBOR case in fact did not make an assumption that because there was an alleged manipulation, that plaintiffs who made allegations exactly similar to the ones that the plaintiffs are making here, that there would have been harm.

THE COURT: She's smarter than me and has a more sophisticated understanding of this.

MR. PORPORA: Your Honor, the only reason why I raise that is because I think it is important for the Court to realize the type of manipulation being alleged here. This is sporadic, multidirectional manipulation that they're alleging. In other words, it happened on some days, it didn't happen on other days.

THE COURT: I don't really understand how you do a manipulation, other than having telephone calls with a whole bunch of traders and everybody agreeing on a certain price. I don't know if this is going to be proved or how it's going to be proved. I'm only dealing with the complaint. It's good enough at this point.

MR. PORPORA: Thank you, your Honor.

I think if we dealt with the standing question, the next topic for me is to address the antitrust claims. So, your Honor, I've been talking about the allegations of conspiracy with respect to Article III. I'm going to presume that you're not going to entertain those same arguments on a *Twombly* basis for purposes of failure to plead a conspiracy.

THE COURT: I'll be consistent with my own rulings.

MR. PORPORA: Yes. In any event, your Honor, there are two other grounds that I would raise for the Court's consideration.

The first of those two is that plaintiff's antitrust claim should be dismissed because the claims are premised entirely on improper group pleading, your Honor. There are no specific allegations in this complaint with respect to specific defendants. What the plaintiffs do is, they name --

THE COURT: Yes, I understand that. For example, Citibank, Citigroup, there are lots of affiliates and subsidiaries that come into play. Shouldn't there be specific allegations against each particular corporate subsidiary? The same is true for Bank of America, JPMorgan Chase, and so on. That's what you mean, right?

MR. PORPORA: Well, I think the problem is twofold, your Honor. I think, even more fundamentally, they don't state individual claims. I represent Barclays, your Honor. It is certainly true that they have engaged in improper pleading by naming, for instance, Barclays PLC, which is a holding company that, by definition, does not trade derivatives and certainly does not submit to SIBOR or any other benchmark. So there's no way that a complaint against Barclays PLC makes any sense under these circumstances. That's a matter of naming corporate affiliates in an improper way.

THE COURT: And there are so many of the same nature.

MR. PORPORA: Your Honor, I don't mean to interrupt, but even before we get there, the point is, there are no allegations against any Barclays entity. All they say is --

THE COURT: They allege against the whole group.

MR. PORPORA: That is true. And, for example, in their summary of allegations that they filed with the Court not that long ago, what they say -- again, misrepresenting facts -- is that MAS found that all of the defendants were guilty of manipulation. That's what they said. That is, again, impossible, because there is no way that the --

THE COURT: It's a group pleading within a network of banks. It's a group pleading within a particular banking conglomerate. And it's a group pleading among the various conglomerates.

MR. PORPORA: That's exactly right.

THE COURT: Got it. And I'm sympathetic to it, so, Mr. Levis, how are you going to get me out of my sympathy?

MR. LEVIS: Sure. So, as to the banks and the entities that were named in the complaint, we named the entities first based on who was identified by the government regulators. So when MAS sanctioned the 20 entities for participating in a conspiracy, that's the first group of banks that we named. Those are the entities that are listed in here. The allegation that we don't specifically identify what they

did in the course of the conspiracy is because MAS didn't release the particular underlying source documents that they found in their investigation. They identified --

THE COURT: How should that affect me now?

MR. LEVIS: Well, those banks are identified as having participated in a conspiracy, and the regulator has made a finding that they were part of this manipulation. That is sufficient to allege plausible claims against them. We don't need to allege what each bank or each trader at each bank did on an individual basis in order it state a plausible claim. It's plausible that MAS identifies these specific entities as being part of a conspiracy to state claims against them.

The other banks that you name come from, for example, other government settlements. So there are other entities that are identified in the CFTC settlements of Deutsche Bank, RBS, and UBS, as engaging in the similar misconduct in manipulating SIBOR and SOR as they did in other benchmark rates.

One of the articles that Mr. Porpora handed up to you before, the second article -- I don't know what exhibit was attached to the complaint, but it is titled "Exclusive Bank Probe Finds Manipulation in Singapore Offshore FX Market." If you go to the next-to-last page of that article, it says, "Through its internal investigations, UBS identified evidence of similar misconduct involving submissions for at least the Hong Kong interbank offered rate, the Singapore interpank

offered rate, the Singapore swap offer rate, and the Australian bank bill swap rate."

We name, for example, the entities that were identified in UBS's settlements, because that's the conduct that is described, that they engaged in similar manipulative conduct.

Now, Mr. Porpora challenges that. As I said, we don't identify specific individual acts by every single defendant, but that's just because the regulator didn't specify individually on every day what the traders did.

THE COURT: And you probably have no way of knowing.

MR. LEVIS: And we can't tell at that time because, right, we don't have the underlying source documents. That's something that will come out in discovery later. We'll get the checks and we'll be able to specify what people did on an individual basis. But a regulator's finding of manipulative conduct as to a specific defendant is surely enough to raise a plausible inference of a conspiracy and sustain antitrust claims against those banks.

THE COURT: So, Mr. Porpora, supposing that the plaintiff is correct that there was a manipulation and that there was a conspiracy to cause a fixing of prices by traders of one or another subsidiary of all the foreign banks, but he can't know which particular subsidiary at this point in time, should I dismiss the complaint?

MR. PORPORA: You should, your Honor, for a number of reasons. Number one, the premise is faulty. MAS says explicitly that it levied sanctions -- and I'm quoting -- for deficiencies in the government's risk management internal controls and surveillance systems relating to benchmark submission processes. There is nothing in there about, these banks were sanctioned because they engaged in a conspiracy to manipulate. The regulator doesn't say that. What Mr. Levis just did was say, because MAS determined that the banks who were sanctioned in the MAS investigation --

THE COURT: The conduct which was not really supervised and which was not detected was the manipulated conduct of which Mr. Levis is complaining.

MR. PORPORA: That is a possibility, your Honor. But what *Twombly* teaches, your Honor --

THE COURT: It's more than a possibility. It's a finding.

MR. PORPORA: It's not --

THE COURT: It's not my finding. It's their finding.

MR. PORPORA: I understand that, your Honor. But MAS itself says explicitly that there has been no conclusive finding of manipulation. It explicitly says that, in its press release.

THE COURT: I'm disinclined, at this point in time, to dismiss the case on that ground, because there was an

actionable manipulation. And if there is jurisdiction, I can't expect the plaintiff to know what the role of each particular banking system was and which part of the banking system of each company effectuated the transactions and benefited from the transactions. It's something, I think, that needs to be done later in the case.

It would bother me a whole lot if, as I say, there was a good cause of action and there is jurisdiction to dismiss because the plaintiff can't know and make the distinctions that eventually the plaintiff will have to make.

MR. PORPORA: Your Honor, I understand all of those principles and thank you for that guidance. The only point I'm raising is --

THE COURT: I don't know if the law says what I'm saying. That's my question. It's a nice sentiment, but I don't know --

MR. PORPORA: I don't think the law does, your Honor. For example -- and I'll go back to my -- the example I used before -- Barclays PLC is merely a holding company. How the plaintiffs could plausibly state --

THE COURT: I'll tell you what I'd do. If there is a judgment that is obtained against any one of the subsidiaries of Barclays, I feel sure that the judgment will be paid, whether by that subsidiary or by a parent. I would love this complaint to be simplified. And one way of simplifying it is

to name just one entity, preferably the parent entity or any other entity, of any one of all these banks, with the assurance that, if there is a judgment, and the whole group of companies can pay it, the judgment will be paid.

MR. ST. PHILLIP: It is our expectation, your Honor, that very shortly in this case, defendants have put in some declarations -- some are very plausible -- in connection with, maybe this entity was not a part of -- did not hire any of these traders, etc. I think it is premature at this time to do that.

THE COURT: I agree. It's premature.

MR. ST. PHILLIP: But we will be able to, eventually.

THE COURT: It's premature at this time, for me to require you to make distinctions among the various plaintiffs, assuming that you've alleged a good cause of action and assuming that there is jurisdiction. All right so far.

MR. ST. PHILLIP: Thank you.

MR. PORPORA: Your Honor, I'll move to the third ground on which the Court should dismiss the plaintiff's antitrust claims. Put simply, the plaintiffs lack antitrust standing because they're not efficient enforcers under the antitrust laws.

THE COURT: What does that mean?

MR. PORPORA: Whether or not the plaintiffs actually are in a position to bring antitrust claims because they've

been sufficiently and directly injured by the antitrust violation.

THE COURT: What do they have to allege? Do they allege a monetary amount?

MR. PORPORA: Courts consider a variety of factors in determining enforcer status. It includes causation, directness, and the speculative nature of damages.

THE COURT: So they've alleged causation, and they've alleged directness. I don't know anything about the damages.

MR. PORPORA: Your Honor, they don't allege, respectfully, causation or directness. I'll deal with those together. They don't allege in any way a sufficiently direct causal relationship between the alleged manipulation and the plaintiffs' supposed losses.

We'll take Sonterra for starters. Sonterra is far two remote to be an efficient enforcer because it transacted solely with nondefendant entities. It doesn't transact with any of the defendants in this case, your Honor. And as the Second Circuit recently expounded in *Gelboim*, in the *Gelboim* decision, indirect purchasers in benchmark cases are remote victims. Three different judges in this district -- Judge Buchwald, Judge Castel, and Judge Woods -- have held that plaintiffs like Sonterra, who allege no direct dealings with defendant, lack antitrust standing. There is literally no reason for the Court to depart from that ruling here.

THE COURT: Does the plaintiff have to allege efficiency?

MR. PORPORA: I'm sorry, your Honor.

THE COURT: Does the plaintiff have to allege efficiency?

I guess, did plaintiff have to allege injury to business or property? And then the consequence comes out of that.

So the question then becomes, Mr. Levis and Mr. St. Phillip, if you've done a contract, a derivatives contract, with a nondefendant, can you sue the defendant for damages?

MR. LEVIS: Well, your Honor, the analysis as to causation and directness, just to put it plainly, is a proximate cause question. And as to whether or not defendants' manipulation, assuming there is a manipulation, because the antitrust standing analysis assumes the existence of a violation at the time you evaluate plaintiffs' standing, assuming that the violation occurred and the rate was manipulated, we purchased contracts that incorporated those manipulated rates.

THE COURT: Did you purchase contracts or did you make contracts?

MR. LEVIS: We purchased contracts. They are kind of like financial products. I mean, they're called derivatives

contracts, but it's a financial product. You buy it from a dealer, who is one of the defendants, and they sell it to you.

THE COURT: Usually the dealer has created the contract.

MR. LEVIS: Correct. So someone creates the contract.

THE COURT: And you look to the terms of the contract for what you can sue for.

MR. LEVIS: And in the contract, we're talking about contracts that incorporate these rates. So we're buying and selling essentially derivatives that -- the price is reflected by the rate when we buy it.

THE COURT: But there have to be representations and warranties there will affect whether you can sue or not.

MR. LEVIS: There are. And to the extent that exists, it's covered by the master agreement, which is a broad kind of umbrella contract that sets the trading relationship. And in that trading agreement, it incorporates all the transactions between the parties and contains in that agreement a representation that the parties will abide by all applicable laws in entering these contracts. And certainly if defendants are conspiring and fixing the price of the contracts, if we're looking at this strictly in terms of a contract claim, then they violated the provisions of the agreement.

But the antitrust standing analysis is not really concerned with the contract in that sense. We're looking at

whether or not defendants are the proximate cause of our injury. And the conspiracy alleged in fixing the SIBOR and SOR benchmark proximately caused our harm and resulted in our damages, which gives us standing to bring these claims.

THE COURT: If you're not bound by the contract and if you're suing on the antitrust conspiracy made in Singapore, I have even less faith than I had before of the jurisdictional aspects of your claim.

MR. LEVIS: Just speaking in terms of antitrust claims, there is no requirement that you have a contract with the defendant. It doesn't require privity.

THE COURT: I understand that. But the contract is what's made in the U.S.

MR. LEVIS: Yes.

THE COURT: And generally speaking a contract will define your rights of action. If you're saying, no, judge, don't even look at that, it doesn't count, we're suing on the antitrust conspiracy in Singapore, you're telling me that the local aspects of jurisdiction don't mean anything.

MR. LEVIS: Well, we're not --

THE COURT: You're telling me that there's no jurisdiction.

MR. LEVIS: That's not what we're saying.

THE COURT: I understand that. But that's the effect of what you're saying.

MR. LEVIS: Well, the contract doesn't define or say anything that we can't sue for antitrust claims and it doesn't limit our remedy to the contract. It actually doesn't get rid of any of these claims. We can sue for a breach of contract claim, which is a separate cause of action, from our antitrust claims, which resulted from fixing the prices of these derivatives by manipulating SIBOR --

THE COURT: Yes. The question is clear. All right.

MR. LEVIS: But in terms of just whether or not we have antitrust standing, we are the proximate cause -- defendants from the proximate cause of our injury.

THE COURT: So you're saying that if there was an antitrust conspiracy, if there is jurisdiction, the fact that you suffered your damage through business transactions with another doesn't prevent you from suing the defendants.

MR. LEVIS: That's right.

THE COURT: Mr. Porpora says just the opposite. So what's the law?

MR. LEVIS: Mr. Porpora referenced *Gelboim* and said that *Gelboim* expounded that you have to transact directly with the defendant. *Gelboim* offered some guidance and came up with some concerns about allowing plaintiffs that didn't transact directly with the defendant to bring antitrust claims. It didn't definitively say that they couldn't. It just issued some concerns.

Now, since *Gelboim*, every court to consider the issue, as Judge Buchwald did in the *U.S. v. LIBOR* case, Judge Castel did in the *Euribor* case, Judge Caproni did in the *Silver Fixing* case, have found at least that those who purchased directly from a defendant, like Frontpoint did from Deutsche Bank, are efficient enforcers and have antitrust standing.

As to whether those who purchased not directly from a defendant have antitrust standing, they do. And the reason they do is really consistent with what Judge Caproni looked at in the *London Silver Fixing* case. And what we're talking about here is, again, an issue of proximate causation and whether or not defendants caused the injury. The concern about allowing non-parties, people who didn't transact with the defendant, to sue them comes out of a concern really that they will be subject to overkill damages and that it would be unfair for them to have to pay damages to people they didn't transact with.

And what happens, though, is because we're dealing with a benchmark manipulation case, when defendants set the price, as Judge Caproni observed, they determine prices for the entire market. So the issue of whether or not they transacted directly with someone doesn't go to whether or not damages here are going to be disproportionate to the wrongdoing, because they are proportionate to the wrongdoing. Defendants, in choosing to fix a financial benchmark, set the price for

everyone, including Sonterra, who, while they didn't transact directly with one of the defendants, purchased a contract that was fixed at an artificial price as a result.

THE COURT: Did Judge Buchwald hold that there is a cause of action by the so-called indirect plaintiff?

MR. LEVIS: No. Judge Buchwald dismissed the claims of indirect purchasers.

THE COURT: And how about Judge Caproni?

MR. LEVIS: Judge Caproni did sustain claims of indirect purchasers.

THE COURT: Two smart judges have done opposite things.

MR. LEVIS: And Judge Caproni's analysis focused on the fact that plaintiffs do not need to directly purchase from a defendant because it's not a matter of privity. What she was analyzing --

THE COURT: You don't need privity for the antitrust.

MR. LEVIS: You don't need privity for antitrust.

THE COURT: But there is or indirect consequences in antitrust law.

MR. LEVIS: She was looking at the fact that indirectness is the directness of the injury, in fixing the benchmark that controls the price of the contract that plaintiffs purchased. That is a direct injury that is sufficiently direct to confer antitrust standing.

THE COURT: Which other of my intelligent comrades have done different things?

MR. LEVIS: Well, Judge Castel, in Euribor, followed Judge Buchwald. And Judge Caproni -- she had two cases, so both in *Silver* and *Gold* she reached the same conclusion.

THE COURT: So it's Buchwald and Castel against Caproni.

MR. LEVIS: Yes.

MR. PORPORA: Your Honor, if I could briefly respond.

THE COURT: Sure.

MR. PORPORA: We'll add in Judge Woods as well in the *Platinum and Palladium* case, who did follow the Second Circuit's guidance in *Gelboim* and did not sustain the claim of an indirect purchaser.

THE COURT: How could Judge Caproni go against the Second Circuit?

MR. PORPORA: Well, your Honor, Judge Caproni -- and I think Mr. Levis referenced the differentiating aspect there. Judge Caproni based her ruling on the fact that the wrongdoer there had set the case for the entire market. That is simply not the case with respect to SIBOR, whether the SGD versus SIBOR or SOR.

THE COURT: Yes. That's what they allege.

MR. PORPORA: Your Honor, they allege a number of things without factual support. But the point is, for example,

Mr. Levis referenced one of the concerns with allowing indirect purchaser claims to go forward. We talk about overkill recoveries. As the Second Circuit said in *Gelboim*, this could potentially lead to the financial ruin of the largest financial institutions. That's one concern, your Honor.

THE COURT: Only if it's a class action.

MR. PORPORA: That's certainly true, your Honor. That is certainly true.

But it goes beyond just the fact that there is significant expansion of the scope of damages in the antitrust world, your Honor. It's also not necessary.

THE COURT: So let me sum up here. As to Frontpoint, clearly it can efficiently enforce the law. As Sonterra, decision is reserved. And I think I'll probably follow Caproni, but I'm not sure.

MR. PORPORA: Your Honor, can I address the Frontpoint claim for one moment? I have not done that.

THE COURT: Yes. I know you have not. Come talk anytime.

MR. PORPORA: No, I appreciate that.

It is not a natural consequence of the fact that Frontpoint had certain purchasers, that it automatically is an efficient enforcer. First of all, again, this case is about three benchmark interest rates. Frontpoint only alleges they were engaged in swaps that were SGD SIBOR. That's one of the

three. They cannot possibly be an efficient enforcer with respect to instruments that are linked to USD SIBOR or to SOR. They are completely different sets of proof there.

THE COURT: And you remind me that the allegations of damage are very vague and we don't know which particular derivatives contract they really complained about and how you can answer. I don't know if this is part of your motion or someone else is going to pick that up.

MR. PORPORA: That is -- you had me right for the next point, your Honor, and I appreciate it.

THE COURT: That allegation, of injury to business or property, is so general and so conclusory as to be worthless. It cannot be properly answered by defendant, and I'll grant that motion, unless I'm persuaded differently.

MR. PORPORA: Your Honor, just for clarity, when you say you will grant the motion, the motion to dismiss the antitrust claim on the ground that they have not adequately allege that they have suffered damages, either Sonterra or Frontpoint.

THE COURT: Sorry?

MR. PORPORA: Either Sonterra or --

THE COURT: Either one, yes.

(Continued on next page)

THE COURT: Mr. Levis, do you want to say something?

MR. LEVIS: I think we have your ruling. I think we understand.

THE COURT: Next.

MR. PORPORA: All right, your Honor. That concludes my presentation. I'll turn things over to Mr. Gluckow.

MR. GLUCKOW: Good afternoon, your Honor. I'm Paul Gluckow with Simpson Thacher. We represent the JP Morgan defendants. I'll be addressing the RICO claims.

Your Honor, the RICO claims here should be dismissed for a few separate and independent reasons. Importantly, the same counsel representing the plaintiffs here --

THE COURT: I've ruled on that already.

MR. GLUCKOW: So that's going to be dismissed.

THE COURT: With leave to replead.

MR. GLUCKOW: I appreciate that, your Honor.

Separate from that, there are a couple of other reasons why the RICO claim should be dismissed, and I would submit without leave to amend because I don't think that these issues can be cured.

The same counsel representing these plaintiffs here on behalf of some of the same named plaintiffs have already tried to assert RICO claims in other IBOR benchmark cases, and in every single one of those instances, the RICO claims have been dismissed, and the same result should obtain here.

Judge Daniels in the Yen LIBOR case and then more recently Judge Castel in the Euribor have rejected the same very RICO arguments that the plaintiffs have advanced here and dismissed those RICO claims with prejudice and without leave to amend.

Your Honor, for the very sound reasons already articulated by Judge Daniels and Judge Castel, the RICO claims here should be dismissed. The first reason, your Honor, separate and apart from a lack of injury to business or property, is that the RICO claims are impermissibly extraterritorial.

Both Judge Daniels and Judge Castel concluded after recent decisions that the RICO claims asserted in the Yen LIBOR case and the Euribor case were impermissibly extraterritorial. Just as in those cases, the only alleged basis for RICO here is alleged wire fraud.

Your Honor, there's no dispute that the wire fraud theory doesn't apply extraterritorially and that plaintiffs must allege a domestic violation of the wire fraud statute.

THE COURT: What happens if the purpose of the wire frauds brought were to create artificial business opportunities and losses in the U.S.?

MR. GLUCKOW: That was considered by both Daniels and Castel and was rejected, your Honor.

THE COURT: Why?

MR. GLUCKOW: The reason is because in order to state a domestic wire fraud claim and thus a RICO claim, the plaintiffs must allege facts sufficient to show that the scheme they're claiming was either directed from the United States or specifically directed to the United States, and both judges went on citing the Second Circuit's case in *Petroleos* to say that some domestic conduct is not enough and that if the U.S. was one of many places where the conduct was directed, that that's also not enough.

As Judge Nathan just recently found in the *Worldwide Directors* case, which wasn't a benchmark case but was a similar RICO issue, the court said that use of the U.S. wires may be necessary, but *Petroleos*, the Second Circuit case, makes it clear that it is not sufficient.

If the domestic conduct alleged is peripheral to the overall scheme and the scheme is not directed to or from the U.S. --

THE COURT: It's not peripheral on their theory, but it's not unique. What is the significance of that?

MR. GLUCKOW: Your Honor, I can't be more clear about this. The allegations in this case, in this SIBOR SOR case, are just about verbatim the same as they were in the Yen LIBOR case that Judge Daniels looked at and in the Euribor case.

THE COURT: They're going to allege -- and you're telling me -- that I should dismiss without giving them leave

to replead.

MR. GLUCKOW: I don't think they can replead. In other words, the facts are what they are.

THE COURT: What is to say that the purpose of the RICO violations in Singapore were to create opportunities for wrongful profits in the United States?

MR. GLUCKOW: Right. The whole point of the decisions that Judge Daniels rendered and that Judge Castel rendered is that that's not enough. First of all, they point out, just like here, that the core conspiracy that's alleged is alleged to have taken place overseas.

In the Yen case with Judge Daniels, it was Japan. In the Euribor case with Judge Castel, it was Europe. Here it's obviously Singapore, but in no case was it the U.S.

Then the plaintiffs' next argument is, well, the counterparties, our clients, were in the United States, and the courts looked at that, and they all concluded that some U.S. effects are not sufficient.

They don't allege that the scheme was directed specifically to the U.S. It was in fact directed, as we heard earlier, worldwide, which included the U.S., but that's not enough under *Petroleos* to sustain a RICO claim.

THE COURT: I was saying the same thing with specific jurisdiction, that the pattern of racketeering activity occurring in Singapore has to have as its purpose a substantial

effect in the United States, perhaps not unique but certainly substantial and perhaps distinctive.

I don't know of any case on that particular point the way I phrase it.

MR. GLUCKOW: Your Honor, I would say that the cases I just referred to -- the *Petroleos* case out of the Second Circuit, Judge Daniels' decision in the Yen case, Judge Castel's very recent decision from February of this year in the Euribor case, and the *Worldwide Directories* case from Judge Nathan -- all say if the conduct was directed outside the U.S. and it had effects in lots of places, including the U.S., that's not sufficient. The RICO claim should be dismissed with prejudice without leave to amend.

THE COURT: Is there any district judge who has taken any opposite point?

MR. GLUCKOW: No, your Honor. Every single one of these similar cases with any kind of a RICO claim in a benchmark context has resulted in a dismissal with prejudice without leave to amend.

It just went to your Honor after the briefing in fact because it came out in February of this year. The plaintiffs originally submitted to your Honor Judge Castel's decision from February 21 in the Euribor case. They didn't mention his holdings about RICO. We then submitted a letter on March 24 highlighting the RICO holdings in our letter.

THE COURT: I think I've got the point.

How do you answer it, Mr. Levis?

MR. LEVIS: Again, it's the same argument as to splitting up the conspiracy. The racketeering activity is not limited solely to the benchmark setting in Singapore.

It's the conduct in the United States in selling off the derivatives, the derivatives that FrontPoint purchased from Deutsche Bank that resulted in an injury to its business or property because it was purchasing these derivatives at a time when defendants were fixing their prices.

THE COURT: That may have been the purpose of the racketeering activity, but the racketeering activity has to be the manipulation. The manipulation is taking place in Singapore.

MR. LEVIS: The sales to the plaintiffs in the United States are certainly part of the racket.

THE COURT: It depends on how you allege and prove intent and how you deal with issues of pattern.

MR. LEVIS: The marketing and the activities in the U.S. that led to these transactions certainly constitute enough in the United States that that's how the racket was operating, in targeting our plaintiffs and selling them manipulated derivatives.

THE COURT: It depends how you allege it and how you're going to prove it. The motion is granted with leave to

amend.

MR. GLUCKOW: Your Honor, the other point I would make on RICO, in addition to the extraterritorial issue, is in order to plead a RICO claim on a 1962(c), they have to allege at least two acts of wire fraud specifically for each defendant, and they also have to satisfy Rule 9(b).

In that same February 2017 Euribor decision from Judge Castel, Judge Castel also dismissed the RICO claims with prejudice and without leave to amend because the plaintiffs there, just like here, failed to plead at least two acts of wire fraud for each of the defendants.

THE COURT: I think they do it but not very succinctly. In the various submissions they quote from the various government agencies' reports. An amendment should make it clear.

MR. GLUCKOW: Your Honor, for example, for my client, JP Morgan, they don't allege any acts of wire fraud. That's true for most of the defendants. They simply allege no facts to show two acts of wire fraud for the defendant. Again --

THE COURT: They show two of each defendant. They need to show a pattern of various defendants. That's their theory.

Do you know of any law that says they have to show two of each one, two of each member of the racketeering activity?

MR. GLUCKOW: They do, your Honor. They have to show

two acts of wire fraud on behalf of each of the defendants. That's very clearly set forth in Judge Castel's recent decision from February of this year. And as part of that, he also cites the *Merrill Lynch v. Young* case previously decided in this court in 1994.

THE COURT: I don't think that's sound. I don't think the law requires that. I'll consider it again. The motion is granted with leave to replead.

MR. GLUCKOW: Your Honor, for the other points that we raised, as to RICO, the lack of RICO standing and failure to plead RICO conspiracy --

THE COURT: That's answered by the better allegation of injury of business or property.

MR. GLUCKOW: Leave to amend?

THE COURT: Yes.

MR. GLUCKOW: Thank you, your Honor.

MR. LEVIS: I only just want to respond, your Honor. In terms of this specifying the acts of the members of the conspiracy, as we discussed earlier, the defendants are identified, and the government findings identify the members of the conspiracy and that they participated in the conspiracy.

As your Honor recognized earlier, the underlying source materials and the documents are not released. That doesn't affect the plausibility of our argument that they participated in a conspiracy because the regulators that

reviewed these materials reached the conclusion that the conspiracy existed and that they did manipulate the rate.

THE COURT: You're alleging RICO, which means you have to allege a pattern of racketeering activity. That's different.

MR. GLUCKOW: It is different, your Honor. Again, I would just point to -- it wasn't just a dicta or a side comment. Judge Castel specifically dismissed --

THE COURT: I will reread the decisions.

MR. GLUCKOW: Thank you, your Honor.

THE COURT: Next.

MR. SYNNOTT: Good afternoon, your Honor. Aidan Synnott from Paul Weiss for Deutsche Bank. I'm here to address the two state law claims that appear in the complaint.

The first is directed only to my client, Deutsche Bank, and to Citibank, and it is based on a paragraph that your Honor has now read several times, paragraph 20, which talks about at least 24 swap transactions, including based on one month's SIBOR that one plaintiff --

THE COURT: I'm sorry. What aspect of the motion are you making?

MR. SYNNOTT: The two state law claims, your Honor, the first for breach of the implied covenant of good faith and fair dealing, which is directed only to Citibank and to Deutsche Bank, and then the second state law claim, which is

unjust enrichment.

THE COURT: There is no claim for good faith and fair dealing in the contract.

MR. SYNNOTT: Yes, your Honor, there is.

THE COURT: Hold on a minute.

MR. LEVIS: There is. There's a claim for the implied covenant of good faith and fair dealing.

THE COURT: Implied in the contract?

MR. LEVIS: Implied in the contract that you will not do something to frustrate the benefit of that contract, for example, by manipulating SIBORs.

THE COURT: Are you pleading a breach of contract?

MR. LEVIS: It's a breach of the implied covenant, which in this case is evidenced by defendants' participation in a conspiracy and Deutsche Bank's participation in a conspiracy to manipulate SIBOR against FrontPoint who it was selling swaps to.

MR. SYNNOTT: That claim, your Honor, appears on page 66 of the amended complaint as the fourth claim for relief.

MR. LEVIS: Judge Buchwald and Judge Castel both sustained similar claims based on the manipulation of LIBOR and Euribor in those cases.

THE COURT: Either it's a breach of contract or it's not a breach of contract. There is no implied covenant outside of contract.

MR. LEVIS: Well, there is an implied covenant not to do something to stop your counterparty from getting the benefit of that contract.

THE COURT: Yes. It's a breach of contract.

MR. LEVIS: I think then it might just be a difference of terminology. Then that's what we're talking about. The claim arises out of defendants' --

THE COURT: In order to set up a breach of the implied covenant of good faith and fair dealing, you have to identify the contract that is involved and the particular aspect of enjoyment that is being frustrated.

Clearly you cannot burden another party's ability to perform a contract. It's all derivative of the existence of a contract and a breach of a contract, and you haven't really pleaded that. There's no in-the-air covenant of good faith and fair dealing. It's all bound by contract terms and conditions.

MR. LEVIS: I will say that other judges have recognized that there is a covenant of good faith and fair dealing.

THE COURT: Maybe they know something I don't know, but I've never held that and do not propose to do that.

MR. LEVIS: As to the term that was being breached, FrontPoint was purchasing swaps from Deutsche Bank where a contract term with SIBOR, and by manipulating that rate, they were harmed, and they paid too much for those contracts.

That's the injury.

THE COURT: That's not an implied covenant of good faith and fair dealing. That's an argument of fraud or an argument of conspiracy to commit a fraud or something of that nature, or it's a breach of contract in terms of the contract itself.

Am I wrong, Mr. Synnott?

MR. SYNNOTT: No. I don't think you're wrong, your Honor. I think that's one of many reasons why this claim should be dismissed.

THE COURT: You could plead a breach of contract, but you can't plead an implied covenant of good faith and fair dealing. So the motion is granted with leave to amend if you want to allege a contract.

I'd advise you that the only way you're going to get specific jurisdiction is through a breach of contract, and the allegations of a breach of contract require you to set out the terms and conditions of the contract that you claim were breached.

There's a master contract pursuant to which there are many other contracts. You may be able to find it in the mechanisms of pricing.

MR. PHILLIP: Thank you for your ruling, your Honor. Is that without prejudice?

THE COURT: Leave to amend.

MR. PHILLIP: Thank you.

THE COURT: As to unjust enrichment, in violation of the common law, this is a tort that is derivative of other torts. It's a remedy. It's not a cause of action in itself. There has to be some independent tort for an enrichment.

What's alleged here is a benefit by the defendants because they committed conspiracies to violate the antitrust laws or to violate RICO or to commit a fraud or a breach of contract.

This is derivative of other remedies. In itself, it is not a cause of action. The motion is granted to that extent. You can embellish any other cause of action you want by claims for unjust enrichment.

MR. SYNNOTT: Thank you, your Honor.

THE COURT: Great argument, Mr. Synnott.

MR. SYNNOTT: Thank you, your Honor. I know when to stop.

THE COURT: Anyone else?

All right. I've done all of my day's work.

MR. LEVIS: Yes, your Honor.

THE COURT: So I will be delivering a summary order of what I did plus an opinion on what I reserved, which I hope won't take too long. I'll give you a month from the date of that to amend, if that's okay.

MR. PHILLIP: That's fine with the plaintiffs,

your Honor. Thank you.

THE COURT: Okay. Then the defense will either make another motion or answer. Thank you all very much.

(Adjourned)